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No. 02-694

IN THE

Supreme Court of the United States

VERONICA M. JOHNSON and
CHRISTOPHER L. JOHNSON,

Petitioners,

v.

EMERALD GREENS PROPERTY OWNERS ASSOCIATION BOARD OF DIRECTORS, *et al.*, and EMERALD GREENS PROPERTY OWNERS ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS EMERALD GREENS PROPERTY OWNERS ASSOCIATION BOARD OF DIRECTORS, *et al.*

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QUESTIONS PRESENTED

I. Whether a party may appeal in the United States Supreme Court, an issue not raised before the Trial Court or Appellate Court?

II. Whether the Seventh Amendment right to a trial by jury was impermissibly infringed in this case?

LIST OF PARTIES AND STATEMENT PURSUANT TO RULE 29.6

Respondents, Emerald Greens Property Owners Association Board of Directors, *et al.* ("Individual Respondents") are individuals.

Respondent, Emerald Greens Property Owners Association (the "Association") is a nonprofit, nonstock corporation organized pursuant to the Virginia Nonstock Corporation Act, Title 13.1 Virginia Code Annotated §§ 801–980 (1950 as amended) and thus there are no publicly held or parent corporations owning any stock in the corporation.

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STATEMENT OF THE CASE

Petitioners, Christopher L. and Veronica M. Johnson (collectively, the "Johnsons" or "Petitioners"), brought a counterclaim against the Individual Respondents pursuant to several anti-discrimination statutes, alleging that The Emerald Greens Property Owners Association (the "Association") and eight current and/or former officers or members of its Board of Directors discriminated against them by filing a lawsuit to enforce a neighborhood covenant against the Johnsons. The Johnsons constructed a fence which violated the covenants and the Association sued to force the Johnsons to move the fence. *See* Appendix of Petitioners at pg. 8. Initially, the Johnsons claimed that the Association and the Third Party Defendants violated provisions of the Fair Housing Act ("FHA"), specifically 42 U.S.C. §§ 3604 and 3617, the Civil Rights Act of 1866, 42 U.S.C. § 1981, as well as 42 U.S.C. § 1982, 42 U.S.C. § 1985, U.S. Const. Amend. XIV, and breached the covenants. The Johnsons also claimed that Individual Third Party Respondents made statements which interfered with the exercise of their rights under the FHA. *See* Appendix of Petitioners at pgs. 9-10.

The Individual Respondents filed their Motion for Summary Judgment against the Petitioners on August 20, 2001. Also on that date, the Individual Respondents served the Johnsons with the requisite notice of the summary judgment proceedings as required by *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975).

The District Court heard argument on each party's Motion for Summary Judgment on October16, 2001, and other motions which are not the subject of the Appeal. In an opinion dated and filed October 25, 2001, the District Court

granted the Association's Motion for Summary Judgment; granted the Individual Third-Party Defendants' Motion for Summary Judgment; and denied Johnsons' Motion for Summary Judgment. The District Court also granted a motion by the Individual Third Party Defendants to dismiss two of the Individual Third Party Defendants, Ann Del Core and David Thompson, on the grounds that neither person was a member of the Board of Directors of Emerald Greens at the time the decision to institute suit against the Johnsons was made. That dismissal was not appealed by the Johnsons. Finally, the Court remanded all remaining issues in the case (namely, the Association's original action against the Johnsons) to the Circuit Court of the City of Chesapeake, Virginia, pursuant to 28 U.S.C. § 1447(c).

The District Court ruled that all other pending motions were mooted by the granting of Summary Judgment. Two of those mooted motions, the Plaintiff's Motion to Exclude Expert Lewis Bridges, Jr. and Expert Report, and Third-Party Defendants' Motion to Exclude Expert Testimony have apparently generated confusion on behalf of the Johnsons.

On November 21, 2001 the Petitioners filed their Notice of Appeal to the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"). On December 6, 2001, the Fourth Circuit entered an order directing this matter to proceed on Informal Briefs as allowed by the Local Rule 34(b) of the Fourth Circuit.

On January 24, 2002, Petitioners filed their Informal Brief with the Fourth Circuit. On February 8, 2002, Individual Respondents filed their Informal Brief with the Fourth Circuit.

On May 14, 2002, without hearing oral argument, the Fourth Circuit issued an unpublished opinion, per curiam, affirming the District Court's grant of summary judgment to the Individual Respondents and the Association and denial of the Petitioner's Motion for Summary Judgment.

On June 17, 2002, the Fourth Circuit, without comment, denied Petitioners' Petition for Rehearing and Rehearing En Banc.

The Petitioners, at this late point attempt to raise for the first time in this extensive litigation a Seventh Amendment challenge to the District Court's award of Summary Judgment. Likewise, the Petitioners did not raise such an argument in the United States Court of Appeals of the Fourth Circuit either on the direct Appeal or on the Motion for Reconsideration or the Motion for Rehearing En Banc. Further, while much of Petitioners other statements of the case are factually inaccurate, it is irrelevant to the issues presented in their Petition for a Writ of Certiorari and thus will not be responded to at this point.

SUMMARY OF THE ARGUMENT

This Court should deny the request for a Writ of Certiorari because the Petition is based on matters, which were not raised on appeal for the United States Court of Appeals for the Fourth Circuit. No error can be assigned to a lower court for an issue with which it has not been confronted.

Regardless of whether the Petitioners had raised a Seventh Amendment question before the Fourth Circuit, their Seventh Amendment rights have not been impermissibly infringed on.

REASONS FOR DENYING THE PETITION

I. The Petitioners claim of Seventh Amendment violation is not presented properly to this Court for review.

The Petitioners are raising a Seventh Amendment question for the first time in their Petition for a Writ of Certiorari (the "Petition").

The Petitioners raised numerous issues in their appeal to the United States Court of Appeals for the Fourth Circuit, none of which involved or implicated the Seventh Amendment. Further, in their Motion for Reconsideration to the Court of Appeals, the Seventh Amendment was not mentioned, discussed, briefed or considered. Most telling, however, is the Petitioners inability to point this Court to any portion of the record regarding the Seventh Amendment. Rule 14.1(g)(i) of this Court requires a Petition for a Writ of Certiorari to specify: the stage and the proceedings, both in the Court of first instance and in the Appellate Court, when federal questions sought to be reviewed were raised . . . with a specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on Writ of Certiorari. Sup. Ct. R. 14.1(g)(i). The Petitioners' Petition for a Writ of Certiorari fails to comply with this Rule, in effect confessing Petitioners' inability to present a reviewable federal question.

This Court takes a dim view of Appellate claims, which surface for the first time on Appeal. "Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of

Appeals." *E.E.O.C. v. Federal Labor Authority*, 476 U.S. 19, 24, 106 S. Ct. 1678, 1681 (1986) (Refusing to address claim of federal agency which was not raised either at the administrative level or on appeal); *see also Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1552, 1531 (1992).

Petitioners offer no excuse for their failure to raise this issue below, or argument of any kind to encourage this Court to abandon its usual practice and consider an issue raised for the first time in a petition for a writ of certiorari.

Simply put, the Johnson's novel theory that the grant of Summary Judgment has impermissibly denied them their Seventh Amendment right to trial by jury, was not raised to the Fourth Circuit, and as such should not be considered by this Court for the first time on review.

II. The Seventh Amendment is not implicated in this case.

Even if Petitioners had advanced a Seventh Amendment argument below, there is still no basis for the grant of a Writ of Certiorari.

Petitioners' argument to this Court that the District Court's grant of summary judgment amounted to an impermissible infringement upon the right to trial by jury as guaranteed by the Seventh Amendment of the Constitution of the United States is wholly without merit or support.

Individual Respondents were unable to locate any law or authority for the proposition that a proper grant of summary judgment can in any way infringe on the losing party's right to a trial by jury. Therefore, even if they had advanced this

novel theory below, Petitioners' argument must fail if the grant of summary judgment by the Trial Court was proper.

Summary Judgment is appropriate when it is apparent from the entire record, viewed in light most favorable to the non-moving party, that there are no genuine disputes of material fact. *See, e.g., Clark v. Alexander*, 85 F.3d 146, 150 (4th Cir. 1996); *Celotex Corp. v. Catrett*, 447 U.S. 317, 322-324, 106 S. Ct. 25, 2552-2253 (1986). The Court will deny summary judgment when sufficient evidence exists favoring the non-moving party which would allow a reasonable jury to return a verdict for that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). In this case, the Petitioners failed to produce any evidence whatsoever in support of their claims. *See* Petitioners' Appendix pg. 17. Instead, they chose to rely on the face of their pleadings and their oral argument. Such evidence does not rise to the level which will defeat a Motion for Summary Judgment. Fed. R. Civ. P. 56(e); *see also Dixon v. State Farm Fire & Cas. Ins. Co.*, 926 F. Supp. 548, 459 (E.D. Va. 1996). Simply put, Individual Respondents filed their Motion for Summary Judgment, and their Brief in Support of the Motion for Summary Judgment which set out in detail the lack of sustainable factual allegations in the Petitioners' case, and the legal basis in support of their grant for summary judgment. Individual Respondents further filed affidavits under oath supporting all the factual allegations raised in their Motion for Summary Judgment and Brief in Support of same.

In spite of receiving the required Roseboro notice, as required by Rule 7(j) of the local rules of the District Court for Eastern District of Virginia, Petitioners offered no facts in response nor any argument which could rebut those made

by Individual Respondents. Based upon the record, and Petitioners abject failure to respond appropriately to the Motion for Summary Judgment, the Trial Court appropriately granted summary judgment in favor of the Individual Respondents.

Furthermore, the District Court's Opinion examines each Count of the Petitioners' claim and takes the position that if Petitioners had produced evidence as understood in the record that they still would not have survived Summary Judgment. The Petitioners have produced nothing in their pleadings with the Fourth Circuit, or in their Petition to this Court nor set forth any legal basis or additional facts which argue against any of the Trial Court or conclusions or Fourth Circuit's subsequent affirmation of the Trial Court. The simple fact is that the voluminous record in this case yields no evidence in support of the Petitioners' various claims of violations of the Fair Housing Act or various other civil rights acts. Petitioners failed to produce any evidence of discriminatory intent which is necessary to sustain a violation of the Civil Rights Act of 1866, Section 1981 or Section 1982. *See* 42 U.S.C. §§ 1981, 1982. They offered no evidence, arguments or brief in support of their contention that their rights guaranteed to them by the Fourteenth Amendment of the Constitution were violated.

The Petitioners offered no evidence or brief to suggest that the Fair Housing Act is even applicable to this situation. The Individual Respondents have demonstrated that the Fair Housing Act requires the sale or rental of property to be involved before a claim may be sustained based upon race. Notwithstanding the dearth of evidence of any action or discrimination based upon race; no sale or rental is implicated in this case. As the District Court observed in granting

summary judgment "The Fair Housing Act provides no cause of action for disparate treatment which does not involve the sale or rental of property." Petitioners' Appendix pg. 21. Petitioners have made no argument in support of an expansion of that Act beyond sale or rental of property, and Individual Respondents are aware of no precedent or authority which would support such an expansion.

Lastly, Petitioners' insistence that their sworn complaint and expert report of an engineer as to racial discrimination constitutes evidence to overcome the voluminous facts put forth by the Individual Respondents is meritless. This argument was fully and properly addressed by the Trial Court and the Fourth Circuit and Petitioners have put forward no law or compelling argument in favor of a different result.

The Petition puts forward no new evidence, demonstrates no legal error on the part of the District Court, or Fourth Circuit, nor presents any compelling issue or conflict among the circuits which would support a grant of a Writ of Certiorari.

CONCLUSION

The Johnson's appeal to this Court for reasons that are argued for the first time in their Petition for a Writ of Certiorari, is improper to ask a higher Court to revisit and reverse the lower Court's decision when the later has not had the opportunity to address these same issues. The Petition should be denied for the reasons and authorities stated above.

Respectfully submitted,

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